Supreme Court, U.S.
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No. 98-1251

In The

Supreme Court of the United States

October Term, 1998

WYTISHA CARTER,

Petitioner,

vs.

SAM ALLEN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Statement of Facts and Procedural History

Petitioner filed two actions against Respondent Sam Allen (hereinafter "Allen"). In the first, she failed to serve Allen within 120 days of filing her complaint as required by Federal Rule of Civil Procedure 4. (*Carter I*). The District Court found the complaint in *Carter I* to be void because of the lack of timely service.

Within days of *Carter I*'s dismissal, Petitioner refiled an identical complaint. (*Carter II*). Respondent immediately moved the District Court pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint asserting the statute of limitations had expired. After hearing oral argument, the District Court found the complaint untimely and dismissed it with prejudice. The District Court held Plaintiff was not entitled to utilize the Georgia Renewal Statute, O.C.G.A. § 9-2-61, because Petitioner's first suit had not been voluntarily dismissed.

Petitioner filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit. Simultaneously, she filed a motion for reconsideration in the District Court attaching her affidavit for the first time asserting she was under the age of 18 when the incident which allegedly forms the basis of this action occurred. The District Court denied the motion for reconsideration because Petitioner's notice of appeal deprived it of jurisdiction.

The United States Court of Appeals for the Eleventh Circuit affirmed the District Court. The Court of Appeals held *Carter I* was judicially declared void by the District

Court dismissal of that action for untimely service. Because there was no valid prior action, Petitioner was unable to utilize the protections of O.C.G.A. § 9-2-61 to renew the prior action. The Court also held the statute of limitations was not tolled during the pendency of *Carter I* since there was no valid suit in *Carter I* to which tolling could attach.

The factual incidents related to the occurrence which gives rise to Plaintiff's complaint are largely irrelevant to the issues presented by this action. However, to the extent the facts are relevant, they are taken as true solely for purposes of Respondent's motion to dismiss in the District Court.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Introduction

The District Court properly dismissed Petitioner's second complaint (*Carter II*). Under no set of facts before the District Court was this complaint timely filed. As aptly put by the District Court, "Absolutely all the kings [sic] men and all the king's horses can't put [H]umpty [D]umpty back together again, and nobody could put that lawsuit back together again once it is filed too late, under the statutes." (T1-11). No issue is presented for this Court to review and Petitioner's petition for a *writ of certiorari* should be denied.

B. The District Court properly dismissed Plaintiff's complaint as untimely filed.

Federal Courts apply the most analogous state statute of limitations when determining what statute of limitations applies to a claim under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985). In Georgia, the statute of limitations for claims of personal injury under state law is two years. O.C.G.A. § 9-3-33. The Court of Appeals held the two year statute applicable to alleged violations of federally protected rights pursuant to 42 U.S.C. § 1983. *Williams v. City of Atlanta*, 794 F.2d 624 (11th Cir. 1986); *see also, Camps v. Warner Robins*, 822 F. Supp. 724 (M.D. Ga. 1993). Plaintiff had two years from the date her claim arose in which to file her lawsuit.

Petitioner alleges, and Allen does not dispute for purposes of this proceeding, the incident at issue occurred on or about April 2, 1994. (R1-1-2 at ¶¶ 4-5). The District Court correctly concluded a cause of action accrues when a plaintiff knows, or in the reasonable exercise of her rights should know, she may have been harmed. (R1-15-3 (citing *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987)). *Carter II* was filed December 20, 1996. That date is indisputably more than two years after the incident about which Plaintiff complains is alleged to have occurred. Accordingly, Petitioner's complaint is barred by the statute of limitations and the District Court correctly dismissed this complaint.

C. The District Court correctly found the statute of limitations was not tolled by operation of law, therefore Petitioner's complaint was properly dismissed.

Petitioner's argument asserts the statute of limitations was tolled by operation of law during the pendency of *Carter I*. That assertion was correctly rejected by each of the lower courts. No issue is presented which would suggest probable jurisdiction in this Court or a reviewable opinion on *certiorari*.

Petitioner's assertion the statute of limitations was tolled during the pendency of *Carter I* is without legal foundation. She argues without explication that the opinion of the Eleventh Circuit which affirmed the dismissal of *Carter I* is in conflict with a decision of the Tenth Circuit. (Petition for *certiorari* at 5). She provides the Court no reasons why the decisions are supposedly in conflict. Indeed, her Appendix completely omits the substance of the Circuit Court's opinion which Petitioner seeks to have this Court review.

The Circuit Court's Opinion held that the filing of a lawsuit (*Carter I*) that is judicially determined to be void does not toll the statute of limitations. "[D]ismissal under Rule [4(m)] invalidates the previous filing of a lawsuit thereby creating the legal fiction that the suit was never filed." *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298, 1306 (3rd Cir. 1995). The dismissal without prejudice is designed to leave the plaintiff in the same position as if the previous lawsuit had never been filed. *Holbun v. Goldberg*, 823 F.2d 399 (5th Cir. 1987); *Johnston v. Ethyl*

Corp., 683 F. Supp. 1059, 1061 (M.D. La. 1988). Commentators have also acknowledged this rule. 4A Wright & Miller, *Federal Practice and Procedure*, § 1137 at 399 (1987). Despite the fact the Federal Rule of Civil Procedure 4(m) dismissal is without prejudice, a subsequent suit is time barred if the statute of limitations expired before the first suit is dismissed. *Norlock v. City of Garland*, 768 F.2d 654, 658 (5th Cir. 1985).

The Lower Courts correctly found the mere filing of the first lawsuit, without proper and timely service, did not operate to toll the statute of limitations. The District Court found this result to be in accordance with and supported by the public policy surrounding the limitation of actions. (R1-15-7 to -8). As the District Court observed, "If the limitations period could be tolled during the pendency of a suit that was ultimately dismissed for failure to timely serve a defendant, a plaintiff could extend the limitations period of an action almost indefinitely simply [by] continuing to file lawsuits that were never served." (R1-15-7 to -8). The Circuit Court adopted this precise language in its Opinion as well. The Courts below correctly declined to countenance such a practice.

Petitioner also asserts the statute of limitation was tolled by reason of her minority at the time of the incident. That argument, raised for the first time on appeal, was properly rejected as well. Under the clear and unequivocal facts in the record, Petitioner turned 18 years old in November 1994. Assuming *arguendo* the statute of limitations was tolled until her 18th birthday, the statute still expired more than a month before the filing of *Carter II*. Petitioner's minority provides no basis for further review by this Court.

Petitioner's result in this action is not of the District Court's making, nor a problem of the Federal Rules of Civil Procedure, nor a conflict in the law of the Circuits. Petitioner argued vociferously in the District Court that she obtained proper service on Allen in *Carter I*. She waited until after the District Court ruled and dismissed her claim before refiling. That decision proved fatal to her claim because the suit was no longer merely voidable but judicially *void*, *Hobbs v. Arthur*, 264 Ga. 359, 360, 444 S.E.2d 322, 323 (1994), and O.C.G.A. § 9-2-61 was incapable of resurrecting her claim as a matter of state law. *Scott v. Muscogee County*, 949 F.2d 1122 (11th Cir. 1992). The District Court's observations to Petitioner's then-counsel at the hearing in this matter bear repeating,

> You know, the thing is, Mr. King, you are admitted to practice law here in the State of Georgia. You are a member of this court. You ought to know, any lawyer ought to know, the most elemental thing is to get proper service. And you get proper service, if it is not acknowledged, by having someone authorized to make service, serve it on the defendant.
>
> And this dragged on all through the late winter, the spring, the summer, the fall, into winter. And finally getting absolutely no cooperation out of you, the court dismissed the lawsuit.
>
> You were, you had many opportunities, alarm bells going off all over the place, telling you something is wrong here. I have got to get this suit properly served. But nothing happened.

(T1-9).

This is not a situation in which this Court needs to fashion a rule to correct an injustice. The injustice would be created were this Court to reverse the Lower Courts. Plaintiff's first lawsuit was found to be void by the District Court. That ruling was not appealed and is presumptively correct. *Carter II* was not timely filed under any theory or argument.

CONCLUSION

The Circuit Court should be affirmed. The Court correctly held *Carter II* is barred by the expiration of the statute of limitations. The statute was not tolled as a result of the filing of her first void lawsuit (*Carter I*). Nor is her present lawsuit timely because of the tolling effect of Plaintiff being a minor at the time of the incident. Finally, the Georgia Renewal Statute provides no haven and basis for allowing *Carter I* to proceed. *Carter I* was judicially determined to be void and as a matter of federal and state law and the statute cannot renew prior actions which are not valid.

There was no error and the District Court's Judgment should be affirmed.

Respectfully submitted,

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* Mr. Balch has applied for admission to the Bar of this Court by letter dated February 17, 1999.